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No. 75-1510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

JACK M. WEATHERFORD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN AGENT OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION, PETE STROM, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF OF THE SOUTH CAROLINA STATE LAW ENFORCEMENT DIVISION; AND OTHER UNKNOWN AGENTS AND OFFICIALS OF THE SOUTH CAROLINA STATE LAW ENFORCEMENT DIVISION, PETITIONERS,

versus

BRETT ALLEN BURSEY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the District of South Carolina, Columbia Division (A. 245) is not reported. The opinion of the United States Court of Appeals for the Fourth Circuit (A. 256) is reported at 528 F. (2d) 483 (4th Cir. 1975).

JURISDICTION

The judgment of the United States District Court for the District of South Carolina, Columbia Division, was entered for the Defendants on August 24, 1974. The lower court decision was appealed and on December 2, 1975, the United States Court of Appeals for the Fourth Circuit entered judgment reversing and remanding to the District Court. Defendants-Petitioners Motion for Rehearing and Motion for Rehearing *En Banc* was denied on January 1, 1976. The petition for a writ of certiorari was filed on April 19, 1976, and was granted on June 21, 1976. The jurisdiction of the Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the mere presence of an undercover agent during a defendant's conversation with his counsel constitutes a *per se* violation of the sixth amendment right to effective assistance of counsel.

2. Whether the concealment of an undercover agent's identity until he testifies against a defendant violated that defendant's right to a fair trial and also violated the principles of *Brady v. Maryland,* 373 U. S. 83 (1963).

3. Whether the findings of the district courts as to *respondeat superior* were clearly erroneous.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983.

STATEMENT

This suit arises under 42 U.S.C. § 1983. The basic facts are as follows:

On July 27, 1970, the plaintiff was tried and convicted by a jury of the crime of malicious destruction of property occupied by the Richland County Selective Service Board.

On the night of March 19, 1970, as a part of demonstrations connected with "National Anti-Draft Week" the respondent, the petitioner Weatherford and one or two others went to the office of the Richland County Selective Service Board in Columbia, South Carolina, where a brick was thrown through a window, and red paint was sprayed and splattered on the inside and outside of the building. Attached to the brick was a note attacking the Selective Service System and the war in Vietnam.

Some months prior to March, 1970, petitioner Weatherford was employed by SLED as an undercover agent. At that time he was attending the University of South Carolina and became acquainted with the respondent Bursey through an organization known as "AWARE," which was a group on the University Campus formed to discuss the need for social change and opposition to the war in Vietnam.

On the morning of March 20, 1970, Bursey and Weatherford were arrested after Weatherford had advised SLED agents of the participation by Bursey and Weatherford in the activities at the Selective Service Board Headquarters. Following the arrest, Bursey and Weatherford were taken to the Richland County Jail, where they were booked, charged with the offense and placed in separate cells. At the time of their arrest, they were handcuffed together and Bursey suggested that they keep silent and seek legal counsel.

Shortly after release, Bursey employed C. Rauch Wise of Greenwood to represent him in connection with the

criminal charges. Following his release from prison, petitioner Weatherford continued to act as an undercover agent in the employment of SLED and was engaged in investigating activities and seeking information regarding law violations not only in Columbia but in other South Carolina cities. During this time he remained on the payroll of SLED and made most of his reports to Lt. Ronald Cooper; he rarely had any contacts or dealings directly with petitioner Strom.

On two occasions following the employment of Bursey's attorney, said attorney, Bursey and Weatherford met and the approaching trial was discussed. On neither of these occasions did Weatherford seek information from Bursey or his attorney, and on neither occasion did he initiate or ask for the meeting. He was brought into the meetings by Bursey and Bursey's attorney in an effort to obtain information, ideas or suggestions as to Bursey's defense.

Neither following the various meetings with Bursey and/or Bursey's attorney nor at any other time did Weatherford discuss with or pass on to petitioner Strom, any agents of SLED, or to Solicitor John Foard and/or any of his staff any details or information regarding Bursey's trial plans, strategy or anything having to do with the criminal action pending against Bursey. Until the morning of the 27th of July, 1970, Weatherford did not know he would be used as a witness in the criminal action and Solicitor Foard had not decided, until just prior to the call of the case, that he would use Weatherford as a witness. Weatherford testified at the trial of Bursey and the jury found Bursey guilty.

Thereafter on July 2, 1973, respondent Bursey, under 42 U.S.C. 1983, filed a complaint against the petitioner alleging violations of Bursey's rights under the Fourth,

Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The District Court for the District of South Carolina on August 20, 1974, entered judgment for the petitioner because there were no facts to support the respondent's allegations that his constitutional rights were, in fact, violated by the mere presence of Weatherford. The Court of Appeals for the Fourth Circuit reversed the judgment of the District Court holding *inter alia* that any intrusion by Weatherford into Bursey's attorney-client relationship constituted a *per se* violation of Bursey's constitutional rights.

SUMMARY OF ARGUMENT

1. Although it is admitted that the police undercover agent Weatherford was present on two occasions with the respondent and his attorney when matters involving respondent's trial were discussed, the agent's presence was essential for maintenance of his cover. His continued activity as an undercover agent in other matters, was needed by police, and the state had a legitimate interest in protecting his identity.

The agent Weatherford did not seek nor initiate either of the meetings with the respondent and his attorney, but, instead, participated in those discussions so that he would not arouse suspicion about his real identity. At no time did he communicate to police or prosecuting authorities information obtained from such discussions.

In the circumstances, the agent Weatherford's presence at attorney-client discussions did not deny to respondent the Sixth Amendment right to counsel. By inviting and permitting Weatherford to be present at attorney-client discussions, since the attorney did not represent Weatherford, respondent and his attorney waived the confidentiality of such discussions.

2. A criminal defendant is not constitutionally entitled to be informed by the prosecution that one thought to be a confederate in crime is in reality an undercover police agent and will testify against the defendant at trial.

The circuit court's ruling establishes an unprecedented constitutional right to a pre-trial at which the prosecution is required to disclose its case.

3. Absent evidence that petitioner Strom either had direct knowledge of or was directly involved in the alleged denial of respondent's constitutional rights, the doctrine of *respondeat superior* bars any claim for damage under 42 U.S.C. § 1983 against the petitioner Strom.

ARGUMENT

The issues involved are (1) whether the presence of a police undercover agent in attorney-client discussions of the pending trial of a criminal defendant *per se* is a violation of the defendant's constitutionally guaranteed right to effective assistance of counsel, (2) whether failure of the prosecution to disclose to the defendant the identity of the police undercover agent prior to trial, and calling the agent to testify against the defendant at trial, constitute a denial to the defendant of a fair trial, and (3) whether the findings of the district court as to *respondeat superior* were clearly erroneous.

It is argued for the State (prosecution) that the continued anonymity of the undercover agent was to serve the legitimate State interest of having the benefit of his services in other police matters unrelated to the respondent or his prosecution. This, coupled with the fact that the agent never sought to be included in attorney-client conferences and never communicated information gleaned from such discussions to the prosecution, is sufficient to distinguish the situation from a *Coplon-Caldwell* intrusion.[1] As to petitioner Strom, the further argument is made that his actions were not such as to satisfy the "personal involvement" requirement to hold him in any way responsible for the actions of petitioner Weatherford.

1. **The presence of the undercover police agent at attorney-client discussions was a consequence of the Undercover police agent protecting his identity so that he could continue covert operations in unrelated police matters, did not result in prejudice to the respondnt, was justified as advancement of a legitimate State interest, and did not violate the defendant's sixth amendment rights.**

The Circuit made the following conclusions with respect to the effective assistance of counsel:

> "We conclude that whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial." (A. 260.)
>
> "We think *Black v. United States,* 385 U. S. 26 (1966), and *O'Brien v. United States,* 386 U. S. 345 (1967), read together, establish such a *per se* rule." (A. 260.)
>
> "We . . . conclude that on the facts as found by the district court Bursey's rights to effective counsel . . . were violated." (A. 259.)

The findings of fact of the district court of importance to the effective assistance of counsel issue are as follows:

> "9. On two occasions following the employment of plaintiff's attorney, said attorney, the plaintiff and the defendant Weatherford met and the approaching trial was discussed. On neither of these occasions did the defendant Weatherford seek information from the plaintiff or his attorney, and on neither occasion did he initiate or ask for the meeting. He was brought into

[1] *Caldwell v. United States,* 205 F. (2d) 879 (D. C. Cir. 1953), *cert. den.,* 349 U. S. 930 (1955); *Coplon v. United States,* 191 F. (2d) 749 (D. C. Cir. 1951), *cert. den.,* 342 U. S. 926 (1952).

the meetings by the plaintiff and plaintiff's attorney in an effort to obtain information, ideas or suggestions as to the plaintiff's defense. . . ."

"10. The defendant Weatherford did not reveal himself as an informer at the two meetings with the plaintiff and the plaintiff's attorney. He also met the plaintiff's attorney on several occasions at the social events, usually connected with the Chapter of the American Civil Liberties Union in Columbia, South Carolina. On these social contacts he was not asked if he was an agent. In most meetings with the plaintiff's attorney the defendant Weatherford was questioned about how his attorney, Frank Taylor, Sr., was handling his defense. This was a natural reaction of a younger attorney trying to learn from an older more experienced attorney."

"11. That following the various meetings with the plaintiff and/or plaintiff's attorney nor at any other time did the defendant Weatherford discuss with or pass on to defendant Strom, any agents of SLED, or to Solicitor John Foard and/or any of his staff any details or information regarding the plaintiff's trial plans, strategy or anything having to do with the criminal action pending against plaintiff. Until the morning of the 27th of July, 1970, Weatherford did not know he would be used as a witness in the criminal action and Solicitor Foard had not decided, until just prior to the call of the case, that he would use Weatherford as a witness. . . ."

"16. The defendant Weatherford did not in any way interfere with the plaintiff's right to assistance of counsel or right to a fair trial nor did he obtain any information from plaintiff or his attorney amounting to an illegal search and seizure. No information following the arrest of plaintiff or following his employment of counsel was relayed by Weatherford to any agent of SLED or person connected with the prosecution of the case."

In summary the Circuit Court found that because the informer Weatherford was invited by Bursey and his attorney into conversation about the preparation of the trial with Bursey and his attorney that Bursey's Sixth Amendment rights were violated.[2]

This Court and other circuit courts have attempted to establish the basic test to apply in viewing a factual situation and whether or not a defendant's Sixth Amendment rights have been violated. The test most often seen is that surreptitious intrusion may deny those subjects effective assistance of counsel in derogation of their sixth amendment rights. *See, e. g. United States v. Zarzour,* 432 F. (2d) 1 (5th Cir. 1970); *Coplon v. United States,* 191 F. (2d) 749 (D. C. 1951); *Caldwell v. United States,* 205 F. (2d) 879 (D. C. Cir. 1953); *Zweibon, et al. v. Mitchell, et al.,* 516 F. (2d) 594 (D. C. Cir 1975); *United States v Cooper,* 397 F. Supp. 277 (D. C. Nebr. 1975).

In *Hoffa v. United States,* 385 293, 306 (1966), this Court carefully noted that in assuming that *Caldwell, supra,* and *Coplon, supra,* were properly decided that both "dealt with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel."

Other courts have found different tests to apply. In *Ramer v. United States,* 411 F. (2d) 30, 37 (9th Cir. 1969), the court recognized the test to be "surreptitious interception." The Court in *United States v. Zarzour,* 432 F. (2d) 1, 4 (5th Cir. 1970) interpreted *Hoffa, Black, Coplon* and *Caldwell* to require a showing that the government's evidence was "tainted" in order to vitiate the conviction. A violation of the sixth amendment can occur when the in-

[2] The Circuit Court placed no significance upon the fact that any information received by Weatherford due to the conversation with Bursey and his attorney was never passed to SLED or Solicitor Foard nor upon the fact that none of the information received by Weatherford was used in the criminal trial of Bursey.

vasion is sufficiently pervasive and pernicious. *United States v. Mosca,* 475 F. (2d) 1052, 1060 (2nd Cir. 1972). The second circuit in *United States v. Rosner,* 485 F. (2d) 1213, 1224 (2nd Cir. 1973) concluded that a finding of unlawful intrusion must precede the determination of its consequences. In *United States v. Fanning,* 477 F. (2d) 45, 48 (5th Cir. 1973) that court found that there must be an intrusion through an informant and that a showing of prejudice therefrom be made. In *United States v. McCord,* 509 F. (2d) 334, 353 (D. C. Cir. 1975) that court looked to see if the confidences disclosed were given to the United States Attorney's Office. The court in *United States v. Choate,* 527 F. (2d) 748, 751 (9th Cir. 1975) seems to hold that gross surreptitious government invasions into the legal camp may violate defendant's Sixth Amendment right to counsel and that absent a showing of gross surreptitious governmental invasion there must be a showing of prejudice.

In the recent case *United States v. Crow Dog,* 532 F. (2d) 1182, 1198 (8th Cir. 1976) that court said that in the absence of a showing of prejudice there must be the actual gaining of information relative to a charge against a defendant and the information must be obtained by an intrusion into the attorney-client relationship. *Crow Dog* cited *United States v. Cooper,* 397 F. Supp. 277 (D. Neb. 1975) for this proposition. In *Cooper* at 285 that court adopted the following: "If a government informant (1) gains information (2) relating to a charge then pending or being investigated (3) from overhearing conversations, by counsel expected to be confidential, and (4) the information is divulged before or during trial on that charge to counsel handling the prosecution of that charge, then there has been a violation of the defendant's Sixth Amendment right. . . ."

The above is pointed for three purposes, one to show that courts do not adopt a *per se* rule and secondly to show

that no matter the test applied there is no sixth amendment violation in this case. And thirdly to show the confusion that exists in determining when a six amendment violation occurs. As pointed out above the facts in this case show that a defendant and his attorney **invited** the undercover agent into conversations with the defendant and his attorney on two occasions.[3] The many cases cited all require an intrusion; here there was none; Weatherford was invited into all conversations. Some cases require a showing of prejudice; there has been no such showing. Other cases require gross surreptitious invasions; in this case the undercover agent did nothing that would amount even to an invasion. No matter the test no case found elevates the facts of this case into a sixth amendment violation.[4]

The reach of the sixth amendment is only to protect the attorney-client relationship from intrusion in the criminal setting. *Wolff v. McDonnell,* 418 U. S. 539, 576 (1974). If there has been no intrusion there is no violation.

The facts of this case do not show a plan to invade the attorney-client relationship; do not show an effort made to intrude upon the attorney-client relationship; nor do the facts show any action by an undercover agent to thrust himself into the attorney-client relationship. The facts instead show that Weatherford was solicited for each meeting. The first meeting took place at Mr. Bursey's house; this meeting was arranged and initiated solely by Mr. Bursey and his attorney (A. 35). For the second meeting, Mr. Bursey and his attorney went to Weatherford's girlfriend's house and waited for Weatherford (A. 39). Weatherford was compelled to participate in these meetings in order to maintain his cover.

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[3] The record shows that the undercover agent Weatherford did not initiate the meetings nor did he know of the purpose of the meetings nor of the meetings themselves until the defendant Bursey and his attorney were actually in Weatherford's presence.

[4] *But, cf. United States v. Rispo,* 460 F. (2d) 965 (3rd Cir. 1972). *Rispo,* unlike the instant case, the factual tableau was "shocking."

It was felt by state police officials that it was important to the state for the agent Weatherford to maintain secrecy and continue his undercover operations with respect to matters having no connection with the Bursey incident. SLED Officer Cook stated that the agent's involvement with Bursey was only "incidental" to his general assignment, and that he was of great value as an agent in other matters until the time his identity was revealed at Bursey's state court trial. (A. 144-45.) In addition, it was felt that the agent's life might be in danger if his identity was known. (A. 132.) Thus, the state had a legitimate interest in maintaining the secrecy of the agent's identity during the pre-trial entirely separate from its prosecution of the respondent for his part in the Draft Board incident.

The confusion created by the many lower court decisions can be clarified by examining the basic concept of the attorney-client privilege and *Coplon* and *Caldwell.* The basic question thus becomes, was there a valid, confidential attorney-client relationship? Petitioners think that it is elementary that any privileged or confidential relationship was waived when respondent Bursey and his attorney purposely invited petitioner Weatherford to be present at the two meetings. At this point there was no confidential attorney-client relationship to be violated. The presence of a third party not within the umbrella of the privilege destroys any privilege or right to confidentiality of the attorney-client relationship. *See,* VIII Wigmore, *Evidence* § 2311 (McNaughton rev. 1961).

> "One of the circumstances by which it is commonly apparent that the communication is not confidential is the *presence of a third party* who is not the agent of either client or attorney." *Id.* at § 2311.

In *Caldwell* and *Coplon* the boundaries adopted in *Hoffa* are delineated. In *Caldwell* the agent had a dual capacity as defense assistant and agent; he was within the umbrella of the attorney-client privilege. In *Coplon* the agents intercepted telephone calls between an attorney and his client; the attorney-client privilege had thus not been waived and the intrusion in this situation is apparent.

The Court in *Hoffa* recognized that the prosecution's agent must invade the privilege by either intercepting information without knowledge of the attorney and client or by coming within the umbrella of the privilege and subsequently giving information to the prosecution.

In the instant case the holding of the Circuit Court cannot find support in the established case law and reversal is required.

In holding that the mere presence of an undercover agent during a defendant's conversation with his counsel is a *per se* violation of that defendant's sixth amendment right to effective assistance of counsel, the circuit court has incorrectly interpreted *Black v. United States,* 385 U. S. 26 (1966) and *O'Brien v. United States,* 386 U. S. 345 (1967), thereby severely handicapping state officials in their administration of effective law enforcement.

The *Black-O'Brien* rule is construed by the circuit court to hold that whenever there is any kind of intrusion into the attorney-client relationship requiring reversal of a criminal conviction and a new trial, the sixth amendment right to effective assistance of counsel has been abridged. It is respectfully suggested that neither *Black* nor *O'Brien* establish such a *per se* rule.

In *Black,* it was admitted that FBI agents had installed a listening device in Black's hotel suite, and that attorney-client discussions were heard and recorded. At the time of trial, neither the judge nor Black's attorneys knew of the intrusion, and Government attorneys did not realize until two years later that such discussions had been

overheard and recorded. This Court did nothing more in *Black* than remand the case to the district court for a new trial. In the words of the Court, the remand was for the purpose of reviewing the facts surrounding the "bugging".

> "This will give the parties an opportunity to present the relevant evidence and permit the trial judge to decide the questions involved. It will also permit the removal of any doubt as to Black's receiving a fair trial with full consideration being given to the new evidence reported to us by the Solicitor General." *Black*, 385 U. S. 26, 29.

In *O'Brien v. United States, supra,* the Court again remanded for a new trial a case in which it was discovered after trial that a listening device placed by FBI agents had recorded attorney-client conversations.

The circuit court here concluded, apparently relying on *Black* and *O'Brien, supra,* that because the fact of intrusion, unknown by the court and the parties at the time of criminal trial, required new trial, such intrusion was in all cases a *per se* denial of effective assistance of counsel. (A. 260.) This conclusion does not reasonably follow. If the fact of intrusion alone constitutes a denial of the sixth amendment right to counsel, a new trial could never cure the defect. The circuit court says (A. 261):

> "In the context of a civil suit, our holding that Bursey's sixth amendment right to counsel was violated sustains his suit irrespective of any showing of substantial prejudice to his defense. *Via v. Cliff,* 470 F. (2d) 271, 275."

It is submitted that *Black* and *O'Brien, supra,* are not authority for a rule that intrusion alone constitutes a denial of the right to counsel, but that, instead, they hold nothing more than that the fact of intrusion requires full examination into the question of whether or not there has

been such denial.[5] The district court held such an examination and found that there was no denial of Bursey's right to counsel. Until a denial has been established, a civil suit cannot be sustained.

2. **A criminal defendant is not constitutionally entitled to be informed by the prosecution that one thought to be a confederate in crime is in reality an undercover police agent and will testify against the defendant at trial.**

The circuit court held that concealing the identity of the undercover agent during trial preparation, then permitting him to testify against the defendant at trial, violates the Due Process Clause of the fourteenth amendment.

> "We also hold that Bursey's rights to a fair trial were violated by the government's countenancing of Weatherford's role in this case. *Brady v. Maryland,* 373 U. S. 83 (1963). . . . Here appellees insist that state officers may conceal the identity of an informant from a defendant during the trial preparation, that the informant can deny up through the day before his appearance at trial that he will testify against the defendant, and that he can then testify with devastating effect—all without impairing a fair trial. We think not." (A. 261-262.)

This holding contravenes the decisions of this Court that delineate the parameters within which a prosecutor must operate to ensure that a criminal defendant receives a fair trial.

This Court has consistently held that a prosecutor may violate a defendant's constitutional right to a fair trial in two circumstances: (1) the presentation of testimony known to be perjured, *e. g., Mooney v. Holohan,* 294 U. S. 103 (1935), and (2) the suppression of evidence favorable to an accused upon request where the evidence is material

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[5] *United States v. Brown,* 484 F. (2d) 418 (5th Cir. 1973); *Cf. Manuel v. Salisbury,* 446 F. (2d) 453 (6th Cir. 1971).

either to guilt or to punishment, *e. g., Brady v. Maryland,* 373 U. S. 83 (1963). The instant case involves neither of these circumstances, and therefore requires this Court to decide whether the constitutional mandate of a fair trial requires a prosecutor to reveal the evidence he possesses which would incriminate the accused.

The facts in this case demonstrate that Bursey received a fair trial. In fact, the gravamen of Bursey's claim of a denial of his right to a fair trial is that he was unfairly surprised that the prosecution could prove its case.[6] Bursey admitted his guilt at his criminal trial,[7] and during the trial of the instant case (A. at 26-30). This admitted guilt flies in the face of his claim that he was denied a fair trial. The very essence of *Mooney* and *Brady* is this Court's concern that the trial of an accused may be tainted because the jury is presented either an erroneous or an incomplete picture. It is undisputed, however, that Bursey's jury was presented an accurate and complete picture of his criminal activity. It is the accuracy and the thoroughness of the prosecution's case which Bursey would have this Court characterize as a denial of his right to a fair trial. The petitioner has found no authority to support this position.

Finding no support in the transcript of the respondent's trial for the proposition that tained evidence was introduced or withheld, the circuit court held that Bursey

[6] During the sentencing of the respondent, his attorney, C. Rauch Wise, Esquire, stated to the General Sessions Court:

> "What I mean by that Your Honor, is that we were prepared to go to trial for the simple reason that we didn't believe the State could prove its case as required by law, and when they put Mr. Weatherford on the stand, it was pretty obvious that we had a 'different row to hoe', but we made a decision at that time to continue with the trial and see what would ensue. . . ." Record of trial in District Court, Plaintiff's Exhibit 4 at 147.

[7] *See* record of trial in District Court, Plaintiff's Exhibit 4 (Transcript of General Sessions Court Trial, July 27, 1970) at 112-119.

was denied a fair trial because he was denied the opportunity:

> "(1) to consider whether plea bargaining might be the best course, (2) to do a background check on Weatherford for purposes of cross examination, and (3) to attempt to counter the devastating impact of eyewitness identification." (A. 262.)

In essence the circuit court would require the prosecution to disclose its case prior to trial; a constitutionally mandated pretrial disclosure. No decision of this Court goes that far. *Brady* only requires the disclosure of evidence favorable to the accused.

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

None of the reasons advanced by the circuit court support the contention that Bursey was denied a fair trial. A prosecutor is under no obligation to ensure that a criminal defendant has sufficient information so that he may intelligently plea bargain. If the defense must be afforded information about the prosecution's case beforehand so that an appraisal can be made relative to the desirability of plea bargaining, nothing less than all the evidence will suffice. It is not reasonable to argue that plea bargaining can be fully explored with knowledge of only part of the evidence. There is virtually no aspect of the prosecution's case that would not be relevant and material to the issue of plea bargaining, and therefore the circuit court's opinion is an unprecedented effort to force the prosecution to disclose its entire case to an accused. This Court has recently rejected such a proposition. *United States v. Agurs,* No. 75-491, 44 U. S. L. W. 5013, 5017 (U. S. June 22, 1976).

A prosecutor is under no obligation to reveal the identity of an agent far enough in advance of trial to permit the accused the opportunity to conduct a full investigation into the agent's background for the purposes of cross-examination. In the instant case a background investigation would have revealed a prior drug conviction of Weatherford (A. 89-90). This Court, however, has recently held that a prior criminal record is not material to a fair trial, and therefore the prosecution is not obligated to disclose a prior criminal record unless it could create a reasonable doubt. *Agurs, supra,* at 5017. Bursey, however, admitted his guilt at the trial, and it is undisputed that Weatherford truthfully testified about Bursey's criminal activity. Therefore under *Agurs,* the prior criminal record of Weatherford is not material to Bursey's right to a fair trial. In fact, the revelation of Weatherford's past criminal activity in this case would only serve to taint testimony that is admittedly accurate.

The circuit court's final justification for its holding, the constitutional right of a criminal defendant to have an opportunity to counter the devastating impact of eyewitness identification, is likewise without support. This proposition would require all prosecutor's to reveal the names of all eyewitnesses to criminal activity prior to trial. The petitioner has found no decision reaching so far. Moreover, the standard of "devastating impact" is so broad as to virtually require the disclosure of the entire case for the prosecution. Who can determine that some evidence will be devastating, and, therefore, subject to be revealed to the accused, and that other evidence is not devastating and may be kept from him?

Respecting the use of informants, this Court said in *Hoffa v. United States,* 385 U. S. 293, 311 (1966), quoting Judge Learned Hand:

> Courts have countenanced the use of informers from time immemorial; . . . *United States v. Dennis,* 183 F. (2d) 201 at 224.

In *Lopez v. United States,* 373 U. S. 427, 440 (1963), this Court stated:

> The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court.

The present case is hardly distinguishable from the facts in *Hoffa.* There, Hoffa took into his confidence an informer, Partin, who under the Court's premise, was a government informant from the beginning, and was used as a prosecution witness at the criminal trial of Hoffa for attempted bribery of jury members. Answering a fourth amendment attack, this Court said:

> Partin was in the suite by invitation, and every conversation which he heard was either directed toward him or knowingly carried on in his presence . . . Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. *Id.* at 302.

The foregoing language applies equally to a fourteenth amendment attack charging denial of a fair trial. Weatherford's participation with Bursey in the Draft Board inci-

dent, and all conversations between the conspirators prior to the criminal act, resulted in Bursey's misplaced confidence that the agent Weatherford was a valid co-conspirator. Weatherford did not enter into the relationship by means of force or stealth.

> "In the words of the dissenting opinion in *Lopez,* 'the risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." *Hoffa, supra* at 303.

It is also the risk we necessarily assume whenever we enter into criminal activity with another person.

Several decisions seem to require the prosecution to disclose an informer's identity when the informer actually participated in the criminal activity. *See e. g., Roviaro v. United States,* 353 U. S. 53 (1957); *Scher v. United States,* 305 U. S. 251 (1938); *Portomene v. United States,* 221 F. (2d) 582 (5th Cir. 1955); *United States v. Conforti,* 200 F. (2d) 365 (7th Cir. 1952); *Sorrentino v. United States,* 163 F. (2d) 627 (9th Cir. 1947); *Wilson v. United States,* 59 F. (2d) 390 (3rd Cir. 1932). In each of these decisions, however, the defendant was denied a fair trial because the informer was never used by the prosecution as a witness. In each case the defendant was denied access to a material witness, the best witness to the alleged criminal activity. The constitutional right to a fair trial was violated in these cases because the prosecution suppressed material evidence and the jury was deprived of key testimony. That is simply not the situation in this case; there was no suppression of material evidence. The prosecution used the agent as a witness thereby presenting the jury with an accurate and complete picture of Bursey's criminal activity.

In conclusion, the petitioners would be remiss if they did not point out that the circuit court opinion substantially hampers the administration of effective law enforcement. If the prosecution is constitutionally required to reveal the identity of all informants and undercover agents upon the request of the accused, it is respectfully submitted that a decrease in the number of informers and undercover agents necessarily follows. Likewise, if a prosecutor must disclose the identity of law enforcement undercover agents upon the request of the accused, an agent's utility becomes limited to one conviction and his life perhaps endangered by the dissolution of his cover. It is respectfully submitted that an accused's right to a fair trial is more than adequately protected by the existing restraints upon law enforcement officials:

(1) perjured testimony is prohibited,
(2) material, exculpatory evidence cannot be suppressed,
(3) informers who participate in the criminal activity must testify.

An extension of the accused's constitutional right to a fair trial to embrace the facts of this case will further weaken effective law enforcement.

3. **The circuit Court's independent finding of facts and its application of those facts to the doctrine of respondeat superior under § 1983 was erroneous.**

The district court found that "there is no testimony connecting defendant Strom with any of such acts allegedly committed by Weatherford." (A. 255) The Circuit Court held that this finding of fact by the district court was "clearly erroneous," and that "Strom's own decisions directly caused the violation of Bursey's constitutional rights." (A. 262) The decisions of Strom to which the Circuit Court refers are: (1) the decision to maintain

Weatherford's cover; (2) the decision to allow Solicitor Foard to work out the details of maintaining Weatherford's cover; and (3) the decision to allow Weatherford to testify. (A. 262)

It is respectfully submitted that the district court was correct in its finding that Strom had no connection with the actions of Weatherford. To prove that Strom participated in the deprivation of Bursey's constitutional rights, it is essential that Strom had knowledge of Weatherford's meetings with Bursey and Bursey's attorney.

The Circuit Court, finding no direct knowledge on the part of Strom, relies on three of his "decisions" that are unrelated to the plaintiff's alleged constitutional deprivations. Strom's decisions to maintain Weatherford's cover and to entrust this matter to Solicitor Foard are not, by any stretch of the imagination, tantamount to requesting Weatherford to intrude upon the attorney-client relationship. Likewise, Strom's approval of the use of Weatherford as a witness concerned the dissolution of Weatherford's cover, and not the approval of Weatherford's intrusion, if any.

It is respectfully submitted that the Circuit Court finding of fact that Strom caused the violations of Bursey's constitutional rights is clearly erroneous and shocking, requiring reversal.

The Circuit Court concluded that liability through the doctrine of *respondeat superior*[8] does not apply to this case because that doctrine only applies to an "innocent master being held vicariously liable for the acts of his servant." Absent a finding of fact that defendant Strom either directed or knew of agent Weatherford's activities

[8] The Circuit Court and the District Court both recognize that the doctrine of *respondeat superior* does not apply to 42 U. S. C. 1983 actions.

with Bursey and Bursey's attorney, Strom is an innocent master; the District Court correctly so held.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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